STATE OF MICHIGAN

COURT OF APPEALS

STEVEN PAUL JENKINS, Plaintiff-Appellant,	UNPUBLISHED January 21, 2003
v	Nos. 238987; 241513 Wayne Circuit Court
RAE JEAN BLEDSOE-GREEN, Defendant-Appellee.	LC No. 01-126819-DC

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Plaintiff-father appeals as of right from an order denying his complaint to modify the custody of the parties' minor child (docket no. 238987). He also appeals by leave granted the trial court's order which denied his motions to extend parenting time and set aside the order denying his complaint to modify custody, and awarded defendant-mother attorney fees (docket no. 241513). The appeals have been consolidated for consideration by this Court. We affirm.

I

Plaintiff and defendant met in Florida in October 1989, and began living together in May 1990. The parties have never married. In February 1991, the parties had a child, a son. In December 1991, when the child was nine months old, the parties' relationship ended. At that time, defendant unilaterally and without notice to plaintiff, took the child and moved to her mother's home in Ohio. Eventually, in October 1992, a Florida circuit court issued a judgment awarding the parties joint legal custody of the child and awarding physical custody to defendant. A parenting time schedule was established by an order of visitation dated January 18, 1994.

On the record before us, it appears undisputed that for the next seven years the parties' conduct was consistent with the initial custody judgment and parenting time order and that plaintiff consistently exercised his parenting time with the child with no prohibition from defendant. During these years, defendant lived in Ohio, and plaintiff lived primarily in Michigan, his home state, except for a three-year stay in Ohio while attending law school. In August 2000, defendant married her current husband. By all accounts, shortly after the wedding defendant and her new husband began experiencing marital problems and sought counseling. According to plaintiff, in early 2001, defendant told him that she was considering leaving her husband and relocating to Michigan. Plaintiff offered to have the child live with him while defendant "g[o]t out of that relationship," and defendant agreed. In March 2001, the child

moved to Livonia to live with plaintiff and began attending Livonia schools. In May 2001, defendant accepted a thirteen-week nursing assignment in Michigan, left Ohio, and moved into an apartment in Livonia.

Plaintiff argued below that the child's move to Michigan was intended to be permanent. In contrast, defendant maintained that she voluntarily sent the child to temporarily live with plaintiff while she worked on her marital problems and that she had not intended to stay in Michigan permanently, as evidenced by her move back to Ohio when her nursing assignment ended. She contended that plaintiff had agreed to return the child to Ohio. After the school year ended, pursuant to the parenting time order, the child remained with plaintiff for several weeks in the summer and was to return to defendant at the end of his visitation on August 4, 2001. However, on July 31, 2001, plaintiff advised defendant that he was not returning the child to Ohio.

On August 3, 2001, plaintiff filed a complaint to modify custody, alleging that defendant's husband was an abusive alcoholic with a history of domestic violence who was likely to harm the child. On that same day, the trial court issued an order extending plaintiff's parenting time and temporarily keeping the child in Michigan. The trial court also issued a temporary order providing defendant parenting time with the child, and issued a "no contact" order between defendant's husband and the child.

Thereafter, the trial court held a bench trial on plaintiff's complaint to modify custody. Following a six-day trial, the trial court issued an extensive opinion and order, indicating that the turmoil due to defendant's marriage constituted a change in circumstances that justified consideration of plaintiff's request to modify custody. However, after considering the statutory "best interests" factors set forth in MCL 722.23, the trial court denied plaintiff's complaint and ordered the child to be returned to defendant in Ohio, concluding that "this is not one of those 'compelling cases' under which the facts are so strong it warrants disrupting the custodial environment[.]"

Plaintiff appealed the trial court's custody order as of right, and also moved this Court to stay the effect of that order, which would effectively continue the child's residence in Michigan. This Court temporarily stayed the effect of the trial court's order pending review of the transcript of the trial court's interview with the child. In a subsequent order, this Court dissolved the temporary stay and denied plaintiff's motion to stay the effect of the trial court's order.

While his appeal was pending before this Court, plaintiff filed motions with the trial court seeking to extend his parenting time with the child and to set aside the trial court's custody order. The trial court denied plaintiff's motions and awarded defendant attorney fees in connection with plaintiff's motions. Plaintiff thereafter applied for leave to appeal the trial court's order regarding attorney fees and moved for peremptory reversal and immediate consideration to protect the child from harm by defendant and her husband. This Court granted plaintiff's application for leave to appeal and for immediate consideration, but denied his motion for peremptory reversal.

II

When reviewing child custody cases, we review questions of law for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); MCL 722.28. "A court commits legal error when it incorrectly chooses, interprets, or applies the law." *Schoensee v Bennett*, 228 Mich App 305, 312; 577 NW2d 915 (1998). A trial court's findings of fact are reviewed under the great weight of the evidence standard and those findings will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher*, *supra* at 876-878; *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). Finally, because the trial court's custody decision is a discretionary ruling, it is reviewed for an abuse of discretion. *Id.* "An abuse of discretion exists [if] the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997).

III

On appeal, plaintiff first challenges the trial court's denial of his complaint to modify custody. Custody disputes must be resolved in the best interests of the minor child. MCL 722.25(1); *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 595; 532 NW2d 205 (1995).

A. The child's established custodial environment

The first step in deciding a petition for a change of custody is to determine whether an established custodial environment exists. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). Whether an established custodial environment exists is a question of fact. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A custodial environment

> is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and the child is marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Generally, the court's concern is not with the reasons the custodial environment was established, but with whether it exists. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992).

We conclude that the trial court did not clearly err by finding that the child's established custodial environment was with defendant. Although plaintiff exercised all of his parenting time, the ten-year-old child had resided with defendant for his entire life, except the first nine months when the parties resided together and the short time period during which the child lived with plaintiff before these proceedings commenced. While the child was living with defendant, she primarily cared for the child, provided for the child's daily needs, enrolled him in school, and had her mother care for him when she was attending school and working.

We disagree with plaintiff's contention that the child's move to Michigan to live in his physical custody for more than ten months was intended to be a permanent move. Rather, as noted by the trial court, the child resided with plaintiff because defendant was having marital issues and she agreed with plaintiff's suggestion that the child could live with him while she worked out her situation. Indeed, during trial, plaintiff testified that he offered to have the minor child come and live with him while defendant "g[o]t out of that relationship," and defendant agreed. In addition, less than five months after the child began living with plaintiff, a custody dispute ensued when defendant sought to take the child back to Ohio after plaintiff's summer visitation had ended. This Court has held that courts should strive to return custody to a parent who relinquished custody temporarily to protect the child's best interests. See *Heltzel v Heltzel*, 248 Mich App 1, 33; 638 NW2d 123 (2001), citing *Straub v Straub*, 209 Mich App 77, 81; 530 NW2d 125 (1995). In sum, the evidence does not support plaintiff's claim that the child's residence with him "was marked by qualities of security, stability, and permanence." *Baker, supra*. Accordingly, the trial court did not clearly err by finding that the child's established custodial environment was with defendant.

B. The child's best interests

Because the child's established custodial environment was with defendant, the trial court could change custody under MCL 722.27(1)(c) only if clear and convincing evidence established that the change was in the child's best interests. *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996). The party seeking to change the custodial environment bears the burden of proving that a change would be in child's best interests, and whether the party has met this burden turns on the trial court's findings regarding the statutory best interest factors, as set forth in MCL 722.23. See *Heid, supra* at 593. However, the overwhelmingly predominant factor is always the welfare of the child. *Id.* at 594.

In analyzing the best interest factors, the trial court noted that it had placed the greatest weight on factors a, d, h, i and j. The court concluded that factors a, c, e, f, g, h, and j favored neither party, that factors d and k slightly favored plaintiff, and that factor b slightly favored defendant. The court also interviewed the ten-year-old child regarding his preference, which is factor i.

On appeal, plaintiff has challenged the trial court's findings of fact with regard to each of the best interest factors, even those that were found to favor plaintiff. We have extensively considered his claims and conclude that none of the trial court's findings are against the great weight of the evidence. Indeed, we find that the trial court's findings are cogent, well reasoned, consistent, and have more than sufficient support in the record. Further, we reject plaintiff's challenge of the trial court's determination of certain witnesses' credibility. The trial court, as the trier of fact, must decide what weight to give to the witnesses' testimony, and "considerable deference is given to the superior vantage point of the trial court respecting issues of credibility and preferences under statutory factors." *Thames v Thames*, 191 Mich App 299, 305; 477 NW2d 496 (1991). We also reject plaintiff's challenge regarding the trial court's determination of the weight accorded certain factors. This Court has held that a trial court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998). Simply put, the evidence does not clearly preponderate toward a contrary finding with respect to any of the challenged factors. *Fletcher, supra* at 879.

C. Trial court's decision not to change the child's custody

We conclude that the trial court did not abuse its discretion by concluding that plaintiff had not met his burden of proving by clear and convincing evidence that a change in the child's physical custody was in his best interests. The sum total of the best interest factors did not overwhelmingly favor either party. As previously indicated, in determining a change in custody, the paramount consideration in a child custody dispute is the child's best interests. *Heid, supra*. As noted by the trial court, it was undisputed that defendant had been a loving and good mother over the child's ten years, that she had cooperated with plaintiff in raising their child, and that she never prohibited him from exercising parenting time with the child. Moreover, by all accounts, the child is a happy, well-rounded, well-behaved, intelligent, and friendly child. Further, the trial court found defendant's husband "quite credible," and the evidence supports the trial court's finding that the situation in their marital household has improved. Finally, the trial court appropriately considered the preference expressed by the child.

In sum, we conclude that the trial court's ultimate finding that plaintiff failed to prove by clear and convincing evidence that it is in the best interests of the child to change physical custody is not against the great weight of the evidence, a palpable abuse of discretion, or a clear legal error. See MCL 722.28.

IV

Plaintiff also argues that the trial court abused its discretion by admitting a letter allegedly written by the child that indicated that he wanted to live with defendant. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

Defendant proffered the letter for the limited purpose of showing the child's state of mind. Defendant testified that the child wrote the letter during school and that she did not encourage the child to write the letter. The letter plainly expressed the child's state of mind at the time it was written. As such, the evidence was admissible under MRE 803(3) as a statement "of the declarant's then existing state of mind . . . [or] . . . mental feeling." The trial court did not abuse its discretion by admitting the letter for the limited purpose of showing the child's state of mind.

V

Plaintiff next argues that the trial court abused its discretion by precluding the child's maternal grandmother and aunt from testifying as to statements the child made to them. During trial, plaintiff sought to have the witnesses testify that the child told them that he was afraid of defendant's husband.

We conclude that the trial court did not abuse its discretion by precluding the proffered evidence, which was hearsay. MRE 801(c). Contrary to plaintiff's claim, MCR 5.972 governs trials in child protective proceedings. Therefore, his reliance on MCR 5.972(C)(2) is misplaced. Further, it is apparent that even if the testimony was admissible, any error in excluding it was harmless. Through the proffered testimony, plaintiff sought to show that the child was afraid of

defendant's husband. Although the two witnesses were not allowed to testify as to what the child told them, both were allowed to testify regarding incidents of when the child acted afraid or expressed fear in relation to defendant's husband. Moreover, the child's psychologist testified that the child told him that he was afraid to live with defendant because of her husband. Because the excluded evidence was merely cumulative to other properly admitted evidence, this claim does not warrant reversal.

VI

Plaintiff also argues that the trial court abused its discretion by denying his motion to set aside the trial court's order denying his complaint to modify custody on the basis of fraud and newly discovered evidence. To support this claim, plaintiff submitted an affidavit from the child's psychologist indicating that the child had said that he was threatened into writing the letter and telling the trial court that he wanted to live with defendant.

This Court reviews a trial court's ruling on a motion for relief from judgment for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

Plaintiff relies on MCR 2.612(C)(1), which provides, in pertinent part, that a court may grant relief from judgment on the following grounds:

> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.

Plaintiff's allegation of fraud rests squarely on newly discovered evidence. To support a grant of relief from judgment, newly discovered evidence must not be merely newly material or cumulative but must be likely to change the result, and the moving party must not have been able to have produced such evidence at trial with reasonable diligence. MCR 2.611(B), 2.612(C)(1)(b). *Hauser v Roma's of Michigan, Inc*, 156 Mich App 102, 106; 401 NW2d 630 (1986). "However, where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect[,] . . . untrustworthy[,] . . . [and] unreliable." *People v Canter*, 197 Mich App 550, 559-560; 496 NW2d 336 (1992) (citations omitted).

Here, contrary to plaintiff's claim, the mere fact that a ten-year-old child in a custody dispute may have changed his position when questioned by one parent or the other is unremarkable, and we are not persuaded that it should have served to justify reconsideration of the trial court's findings following an extensive evidentiary hearing. Indeed, it is impossible to know whether the child was influenced by plaintiff or others post-trial. Further, the trial court addressed these issues during the child's in-camera interview. Moreover, the trial court questioned defendant, and she denied any involvement in the child's writing of the letter. As we noted previously, considerable deference is given to the superior vantage point of the trial court

concerning issues of credibility. *Thames, supra*. Accordingly, we conclude that the trial court did not abuse its discretion by denying plaintiff's motion to set aside the custody order on the basis of "newly discovered evidence."[1]

VII

Plaintiff also argues that the trial court erred by awarding defendant $1,000 in attorney fees for opposing his motion because his motion was expressly authorized by the court rules. However, apart from announcing this issue in his statement of questions presented, plaintiff does not present any facts, authority, or argument to support this claim. Indeed, he does not address the issue at all in the argument portion of his brief. Accordingly, we decline to review this issue because it is not properly presented. To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved. *Ewing v Detroit*, 252 Mich App 149, 169; 651 NW2d 780 (2002).

VIII

Plaintiff's final claim is that this case should be assigned to a different judge on remand because the trial court judge is biased against him. Because plaintiff failed to properly preserve this issue, this Court's review is limited to plain error affecting his substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000).

We initially note that, because remand is unnecessary, this issue is moot. Generally, an appellate court will not review a moot issue. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). However, it is axiomatic that adverse decisions alone do not indicate bias, even if the decisions are otherwise erroneous. *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989). Plaintiff has pointed to nothing other than an adverse ruling on his motion to set aside the custody order in support of his assertion of bias on the part of the trial court. Accordingly, he has failed to meet his burden of establishing that the trial court was actually biased, see *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996), and plaintiff is not entitled to appellate relief on this basis.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette

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[1] We also find that plaintiff is not entitled to relief under MCR 2.612(C)(1)(f). In *Heugel, supra* at 478-479, this Court noted that for relief to be granted under that subsection, three requirements must be met: "(1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." Here, because plaintiff's claims fall squarely within subsections b and c, subsection f is inapplicable.